RECENT CASES.

CRIMES—SIMILAR OFFENSES AS SHOWING INTENT.—On the trial of a notary public for wilfully certifying falsely that a mortgage had been acknowledged before him by the pretended mortgagor, the prosecution claimed that the mortgage had not, in reality, been executed by anyone. Evidence of false certifications of previous mortgages made out to the same individual was held competent to show that in this case the defendant had not been deceived by a pretended mortgagor and that he intended to make the false certificate in question, even though the previous forged mortgages so introduced did not purport to be executed by the same individual as the one for which the accused was indicted. People v. Marrion, 98 N. E. Rep. 474; (N. Y. 1912).

The opinion of the majority of the court seems to be based upon a very broad construction of the offense. The theory upon which the evidence was admitted was that the certificate was forged, and therefore prior forgeries of a substantially similar character should be relevant as evidence of knowledge, intention and absence of mistake in the one in question. On the other hand, the dissenting opinion of three of the justices takes the view that the case really turns upon showing either that the pretended mortgagor did not exist (and therefore the accused inserted a fictitious name), or that the defendant wilfully certified the acknowledgement of a mortgage made by one whom he knew was not the proper party.

Under this narrower view only mortgages purporting to have been executed by the same pretended mortgagor would be relevant, and mortgages purporting to have been executed by other pretended parties at other times, while of great probative value, should be excluded. Curiously enough, both the majority and dissenting opinions rely on People v. Weaver 177 N. Y. 434 (1904) to support their views. It would appear, however, that the construction of this decision as made by the majority is incorrect, since it is clearly stated by O'Brien, J., on p. 442, that evidence of former forgeries of notes is inadmissible except where, aside from other similarities, they also purport to be indorsed by the same individual as the note in issue.

The decisions regarding the admissibility of evidence of such a character as that in the principal case are in great conflict as a result of the differences in broad and narrow construction. As is pointed out in Wigmore on Ev., Vol. 1, Ch. XII, p. 394, "Some judges incline to treat the judicial test of probative value as identical with the common-sense test—while other judges set their faces firmly against every instance which is not on all fours with the offense in issue. It is hopeless to attempt to reconcile the precedents under various heads; for too much depends on the tendency of the court in dealing with a flexible principle. . . It is not the law, nor precedent, nor principle, nor policy that will account for such narrow rulings, but merely a rooted inclination to take the stricter view, and a preference to err in favor of criminals and against innocent victims."

BILLS AND NOTES—RECOVERY ON A CHECK BARRED BY ESTOPPEL.—The plaintiff gave his check to a third person believing he was the owner of land, and on the introduction of a person known to the plaintiff, the defendant bank cashed the check on the same identification. It was held that the plaintiff was estopped from recovering from the defendant, as he himself had put it into the power of a third person to defraud. McHenry v. Old Citizens' Nat. Bank, 97 N. E. 395 (Ohio 1911).

The general rule is that if a bank mistakes the identity of the payee or pays to another upon a forged indorsement, it will remain responsible. Pickle v. Nuise, 88 Tenn. 380 (1889); Dodge v. Nat. Exchange Bank, 30 Ohio St. (1876).

There is a difference of opinion as to what negligence, in the issuance of checks by a depositor, will exhonorate the bank. For particular acts of negligence which have been held sufficient to prevent the depositor from recovering, see Hardey v. Chesapeake Bank, 51 Md. 562 (1879); De Ferrilt v. Bank of America, 23 La. Ann. 310 (1871); Burnet Woods Building Saving Co. v. Bank of Cincinnati, 4 Ohio Dec. 290 (1895). It has been held in the case of a telegraph order for money that a bank which paid, on the identification of a man of good character, was not liable, although the person paid was not the right one. Bank of Cal. v. W. U. T. Co., 52 Cal. 280 (1877).

See also Land Title & Trust Co. v. Northwestern Nat. Bank, 196 Pa. 230 (1900), and 211 Pa. 211 (1905).

CONTRACTS—VALIDITY OF CONTRACTS OF INSANE PERSONS.—Where a *non compos,* a year and a half before inquisition and adjudication, gave a mortgage, to take up a prior mortgage, and the mortgagee was not chargeable with knowledge of the insanity, it was held that the mortgage was valid, the lunatic having received the benefit of the contract. National Metal Edge Box Co. v. Vanderveer, 82 Atl. 837 (Vt. 1912). See also Lincoln v. Buckmaster, 32 Vt. 652 (1860).

It was formerly held that insanity could not be pleaded to avoid a contract. Beverly's Case, 4 Coke, 123; 2 Bl. Comm. 292. Today, most courts hold that the deed of an insane person, who has not been judicially declared insane, is voidable. Barnham v. Kidwell, 113 Ill. 425 (1885); Riley v. Carter, 76 Md. 581 (1893); Blinn v. Schwarz, 177 N. Y. 252 (1904). Or, in some jurisdictions, absolutely void. Soc. v. De Lashmutt, 67 Fed. 399 (1895). This is also the rule as to the simple contracts of a lunatic. Aetna Co. v. Sellers, 154 Ind. 370 (1899); Hovey v. Hobson, 53 Me. 451 (1866); Eaton v. Eaton, 37 N. J. L. 108 (1874); Atwell v. Jenkins, 163 Mass. 362 (1895). These contracts likewise have been held absolutely void in some jurisdictions. Walker v. Winn, 39 So. Rep. 12 (Ala. 1905).

Contracts with a lunatic, made after adjudication, are generally held absolutely void. Griswold v. Butler, 3 Conn. 227 (1819); Burnham v. Kidwell, *supra.* But some courts uphold them when incapacity is clearly rebutted. Parker v. Davis, 53 N. C. 460 (1862); Blaisdell v. Holmes, 48 Vt. 492 (1875).

A lunatic is liable on a contract implied by law where the element of consent is not required. Reando v. Misplay, 90 Mo. 251 (1886); or for necessaries for himself and family. Reando v. Misplay, *supra.* But only for the reasonable value of such necessaries. Milligan v. Pollard, 112 Ala. 465 (1895).

Where the lunatic has received the benefit of an executed contract for a fair consideration, and the parties cannot be restored to their former positions, the contract will be sustained, except where the sane party had, or should have had, knowledge of the insanity. Black v. Gottschalk, 88 Md. 368 (1898); Burnham v. Kidwell, *supra;* Myers v. Knabe, 51 Kas. 720 (1893); Mathieson v. McMahon, 38 N. J. L. 536 (1876); *aliter* where the *status quo* can be restored. Wooley v. Gaines, 114 Ga. 122 (1901).

CRIMES—ATTEMPTS.—To constitute an attempt to commit a crime there must be an intent to commit it, followed by an overt act or acts tending, but failing, to accomplish it. The overt acts need not be such that, if not interrupted, they must result in the commission of the crime, but if directly preparatory to the crime, and tending substantially to accomplish it, they are sufficient to warrant a conviction. State v. Dumas, 136 N. W. Rep. 311, (Minn. 1912).

It would appear to be impossible definitely to state any general definition of an attempt to commit a crime, since the authorities are in conflict. In "Current Law," Vol. XV, p. 1204 (1910-1911) an attempt is defined as "an intended, apparent, unfinished crime amounting to commencement of its consummation." So also in the leading case of People v. Murray, 14

Cal. 160 (1859) the Court said, "The attempt to commit a crime must be manifested by acts which would end in the commission of the particular offense, but for the intervention of circumstances independent of the will the party." On the other hand, in Am. and Eng. Enc. Law, Vol. VIII, p. 293 (2nd Ed.) an attempt is defined as including "an intent to commit the offense and an act done in part execution thereof, falling short, however, of completion." It should be noted that this definition is silent as to how far the act done should go to further the crime. In accord with this is the case of People v. Bush, 4 Hill 133 (N. Y. 1842), where it was stated that where the defendant, intending to commit a particular crime, procures or solicits another to perpetrate it and furnishes him materials for the purpose, it is sufficient to warrant the defendant's conviction.

It is submitted that the last doctrine, like that of the principle case, is incorrect in that it asserts that solicitation and preparation together will amount to an attempt. There is a great difference between preparation for the attempt and the attempt itself; though it is true that the line between solicitation plus preparation and actual attempt is a very difficult one to draw. It is believed that it is impossible to make any accurate distinction on this point, and that each case must rest upon its own particular facts. See also Clark and Marshall, Crim. Law, p. 178 (2nd Ed.) and note in Current Law, 1910-1911, Vol. 15, p. 1204.

CONTEMPT—CIVIL AND CRIMINAL.—In Fiedler v. Bambrick Construction Co., 142 S. W. 1111 (Mo.) 1912, the violation of an injunction restraining a nuisance was held to be a civil contempt punishable by a fine.

"To lay down a general rule by which, in all cases, to distinquish civil and criminal contempt is impracticable." Rapalje, Contempt, Sec. 21. But the following are distinguishing features: (1). If the contemner violates an order of the court to do or to abstain from doing something for the benefit of the opposite party to the suit there is a civil contempt. If the contemner does an act in disrespect of the court or its process there is a criminal contempt. Phillips v. Welch, 11 Nev. 187, 190 (1876); Costilla Land Company v. Allen, 15 New Mexico, 528 (1910). (2). The primary purpose in punishing a civil contempt is to give relief to the opposite party in the suit; if the punishment is a fine it is payable to such party as compensation, while if it is imprisonment it is for an indefinite term until the contemner is willing to abide by the order of the court. The primary purpose in punishing a criminal contempt is to vindicate the authority of the court; the punishment is punitive and if a jail sentence is inflicted it is for a definite period. Hammond v. Sailors' Union, 167 Fed. 809 (1909); Re Nevitt, 117 Fed. 448, 458 (1902). In Gompers v. Buck's Stove Co., 221 U. S. 418, 441 (1910) this distinction was approved of as being an almost universal test, but it was not decisive in that case because of other elements in the case which the court also believed were tests, as follows: (3). "Proceedings for civil contempt are between the original parties and are instituted and tried as part of the main cause; but on the other hand, proceedings at law for criminal contempt are between the public and the defendant and are not part of the original cause." It was on this point that the decision of the lower court was reversed. See page 445. (4.) "The petition was not entitled "U. S. v. Gompers," or, "In re Gompers," as would have been proper and according to some decisions necessary if the proceedings had been at law for criminal contempt." (5.) The fact that the petition for contempt was entitled Buck's Stove Co. v. Am. Fed. of Labor and the prayer was "for such relief as the nature of the petitioner's case may require" indicated that it was instituted for remedial relief to the petitioners and not that the court's authority might be vindicated. "This was a proceeding in equity for civil contempt where the only remedial relief possible was a fine payable to the complainant." Page 451. Here the court seems to assume that the punishment in a civil contempt must necessarily be remedial to the complainant and hence a jail sentence would be illegal if it were not to coerce

the doing of an affirmative act. This would conflict with the case of Fiedler v. Bambrick, 135 Mo. App. 301 (1908) where the president of the corporation was put in jail for violation of a restraining injunction.

DETINUE—BURDEN OF PROVING POSSESSION.—In Maxlow v. Hawk, 233 Pa. 316 (1912), the deceased, who lived with the defendant, was the owner of certain negotiable bonds of which he had possession until a short time before his death. Upon the defendant's refusal to give them up, the executor of the deceased brought detinue. Judgment for the executor was reversed because of the technical error of the court below in trying the case on the theory that proof that title was in the deceased before the defendant's possession, established a *prima facie* case for the plaintiff, whereas the court should have ruled that possession of the bonds by the defendant was *prima facie* evidence of ownership because it was presumed to have been honestly acquired. The *prima facie* ownership which accrues to the holder of a negotiable security by mere possession is easily rebutted by evidence of the bad faith with which the possession was acquired; and the holder then has the burden of proving that he is a holder in due course. Robinson v. Hodgson, 73 Pa. 202, 210 (1873); Cook v. Dowling, 6 N. Y. Misc. 271 (1893); and similarly in case of a chattel, the *prima facie* title by possession is rebutted by proof of prior possession in the absence of a superior right. Magee v. Scott, 63 Mass. 148 (1851). The holder may also prove that he is the donee of a gift *inter vivos*. Jones v. Falls, 101 Mo. App. 536 (1903); Jones v. Jones, 102 Kent. 450, 458 (1897).

TORTS—DOCTRINE OF RYLANDS V. FLETCHER REPUDIATED.—A carrier of an explosive substance such as dynamite is not an insurer against injuries which may result to others from their accidental explosion while in transit, but is liable only on the ground of negligence. The Ingrid, 195 Fed. Rep. 596 (N. Y. 1912).

The gist of this decision would appear to consist of another repudiation of the doctrine of Rylands v. Fletcher, 3 H. L. 330 (Eng. 1868). This doctrine has never been adopted in New York. Losee v. Buchanan, 51 N. Y. 476 (1873); nor in Pennsylvania. Tuckachonsky v. Coal Co., 199 Pa. 515 (1901). The principal case seems to be the first decision by the Federal Courts in which the rule has been overruled; and it is interesting only as another illustration of the disinclination of courts to render decisions adverse to commerce and industry when no evidence of negligence has been shown.

TORTS—LIABILITY OF MANUFACTURER TO CONSUMER.—The liability of the manufacturer of Malt Nutrine, to one who had been made ill by a quantity purchased from a retailer, was before the court in Roberts v. Anheuser-Busch Brewing Ass'n, 98 N. E. Rep. 95 (Mass. 1912). It was held that the advertised representations as to the healthfulness of the mixture must be regarded as continuous, and intended to be relied upon by the ultimate consumer, who could recover in an action of tort. *Accord:* Salmon v. Libby, McNeill & Libby, 219 Ill. 421 (1906); Craft v. Parker, 96 Mich. 245 (1893); Bishop v. Webber, 194 Mass. 341 (1906). *Contra:* Nelson v. Armour Pkg. Co., 76 Ark. 352 (1905).

As a general rule, a manufacturer is not liable to any other than his immediate purchaser, when the subject of the sale is not in itself imminently dangerous, and the sale is not induced by fraud or concealment. McCaffrey v. Mossberg, 23 R. I. 381 (1901); Davidson v. Nichols, 11 Allen, 514 (Mass. 1866); Lewis v. Perry, 111 Cal. 39 (1896); Langridge v. Levy, 2 Mees. & W. 519 (1837); Keulling v. Lean Co., 183 N. Y. 78 (1905); Schubert v. Clark, 49 Minn. 331 (1892).

A number of courts have limited the above rule to cases where the manufacturer did not know of the dangerous defect. O'Neil v. James, 138 Mich. 567 (1904); Heizer v. Kingsland, 110 Mo. 605 (1892); and have

allowed recovery where the defect was known. Torgesen & Schultz, 192 N. Y. 156 (1908); Holmvik v. Parsons, 98 Minn. 424 (1906); Skinn v. Reuter, 135 Mich. 57 (1903). There are a few cases holding that there should be recovery where the manufacturer ought to have known of the defect. Bishop v. Weber, *supra;* George v. Skivington, L. R. 5, Exch. 1 (1869). *Contra:* Lebourdois v. Wheel Co., 194 Mass. 341 (1906).

Where the article is dangerous in itself it of course comes within the rule of Thomas v. Winchester (belladonna), 6 N. Y. App. 397 (1852), and recovery is everywhere allowed. Huset v. Threshing Mch. Co. (threshing machine), 102 Fed. 865 (1903); Wellington v. Downer (gasoline), 104 Mass. 64 (1870); Ellis v. Republic (gasoline), 133 Ia. 11 (1906).